

Background Checks for Montana Healthcare Facilities
Discussion Document and Information
Prepared by: Quality Assurance Division
October 18, 2006

Intent

This document provides awareness, background information, and research regarding the current system of elder abuse prevention within the State of Montana. The purpose of this document is to identify the current systems used by Montana Nursing Facility providers to conduct background checks on employees, outline related Federal requirements for participation in the Medicare and Medicaid programs, and identify what other States are doing to require criminal or background checks for healthcare workers. This document does not make recommendations per se for such legislation in Montana or draw any conclusions regarding the need for such legislation. To request a complete copy of the research documentation, contact the Certification Bureau, Department of Public Health and Human Services at 406-444-2099.

Background

Until the late 1990's, the health care industry and federal oversight agencies lacked concrete data regarding elder abuse in nursing homes. Because of public outcry and alarming statistics of abuse coming out of the Intermediate Care Facilities for persons with Mental Retardation (ICF/MRs) and in-home care provided to elderly people in the community, President Clinton implemented through the Centers for Medicare and Medicaid Services (CMS) the Presidential Initiatives. One of the Presidential Initiatives focused on prevention of abuse to residents who live in nursing homes. A national focus on prevention of elder abuse included such things as:

- Educating survey agency staff in every state.
- Educating direct care nursing home staff in every facility in every state.
- Providing research supported prevention measures called the Seven Protocols for Abuse Prevention which are now included in the federal interpretive guidelines for nursing homes, hospitals and ICF/MRs.
- Inclusive education and direction by the federal government to foster relationships between the OIG, FBI, AG, MFCU, local law enforcement agencies and state agencies within each state.
- Regulations requiring computer national data base to collect statistics about elder abuse in nursing homes.
- Providing funding to state agencies to support the initiative.

The issues regarding elder abuse in nursing homes and other healthcare services is further described in this June 18, 2002 testimony provided by Catherine Hawes, Ph.D. before the U.S. Senate Committee on Finance. Excerpts from her testimony are: *"On any given day, approximately 1.6 million people live in approximately 17,000 licensed nursing homes, and an estimated 900,000 to one million persons live in approximately 45,000*

residential-care facilities, domiciliary care homes, homes for the aged, and assisted living facilities.

These residents are at particular risk for abuse and neglect. Most suffer from several chronic diseases that lead to limitations in physical functioning and are thus dependent on others for assistance in the most basic daily activities, such as bathing, dressing, eating and using the toilet. Further, two-thirds of nursing home residents and an estimated 40 percent of residential care facility residents have significant cognitive impairment, many from diseases such as Alzheimer's. These resident characteristics, particularly a diagnosis of Alzheimer's or other dementias, or challenging behaviors, have been found to place residents at greater risk of both physical and sexual abuse. Finally, only 12 to 13 percent of the residents are married and many of the others lack a close family member who lives within an hour of the facility. Thus, these individuals are extremely vulnerable, largely unable to protect themselves, and dependent for their care on the kindness of strangers."

There is no doubt that protecting the health and safety of seniors who reside in long term care facilities, assisted living facilities, retirement centers, and their own home receiving home care services is an important issue. These individuals are extremely vulnerable, unable to protect themselves, and are dependent for their healthcare from others working in the health care system.

Montana does not require criminal background checks on healthcare workers in nursing facilities or other healthcare facilities. In addition, background checks are not required for healthcare workers that provide services in the senior's home. The absence of such a requirement in Montana does not indicate a complete disregard for this issue. Montana does have a variety of mechanisms under federal survey and certification regulations, provider awareness, professional certification and licensing requirements, and reporting to address this issue. While this reporting, awareness, and regulations do not prohibit the employment of criminals in the healthcare system it acts as a deterrent for the system to monitor the health and safety of our seniors to prevent elder abuse.

MONTANA'S NETWORK OF SYSTEMS AND SERVICES TO ADDRESS ELDER ABUSE

Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act

Montana does have a law that addresses the need to prevent abuse, sexual abuse, neglect, and exploitation of Montana's elderly persons and persons with developmental disabilities. This law entitled the "Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act" is codified in the Montana Code Annotated (MCA) 52-3-Part 8. This law defines abuse and the different types of abuse as well as defines an older person as someone who is at least 60 years of age, defines an incapacitated person, and defines a person with developmental disability. The Act provides for the identification, reporting, and prosecution of acts of abuse, sexual abuse, neglect, and

exploitation. The law also requires reporting by professionals and other persons who in their official capacities know or have reasonable cause to suspect abuse, to the Department of Public Health and Human Services (DPHHS) and or the county attorney. DPHHS is required to investigate reports of abuse, sexual abuse, neglect, and exploitation. All reporting and records are to be kept confidential and may be disclosed, upon request, to certain persons or entities outlined in 52-3-813(2). Under item (f) of this section it provides for release of reports and records to an authorized representative of a provider of services to a person alleged to be abused if disclosure by the department is determined to be necessary to protect a person alleged to be abused. Release of reports is also authorized if the authorized person of a provider of services is carrying out background screening or employment or volunteer related screening of current or prospective employees or volunteers who have or may have unsupervised contact with an older person. A request for this information must be made in writing to the department. In addition, the reports and records may be disclosed under 52-3-813 (4) if the person who is reported to have abused, sexually abused, neglected, or exploited an older person or a person with a developmental disability is the holder of a license, permit, or certificate issued by the department of labor and industry under the provisions of Title 37 or issued by any other entity of the state government. These disclosure requirements would indicate a history and intent by the Montana Legislature to encourage healthcare providers to conduct voluntary background checks on employees or encourage communication with the department to obtain information on current employees or volunteers.

The department supports this Act through communication between the Department of Labor and various divisions and services within the department. Senior and Long Term Care Division (SLTC) is designated as the primary reporting and investigative authority for departmental duties regarding the Act. This is coordinated with the Ombudsman's Office, and other state and federal regulatory agencies within the Department, such as the Quality Assurance Division, Licensing Bureau and the Certification Bureau. QAD works very closely with SLTC in reporting and cooperating in the investigations of any suspected abuse, sexual abuse, neglect, and exploitation of Montana's elderly persons or persons with developmental disabilities.

The Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act provides immunity from civil and criminal liability for health care facilities under MCA 52-3-814 (2) if the information obtained pursuant to 52-3-813(2) to refuse to hire or to discharge an employee, volunteer, or other person who through their employment or volunteer activities may have unsupervised contact with an older person or a person with a developmental disability, unless the person providing or using the information acts in bad faith or with malicious purpose.

The penalties under the Act for an individual who purposely or knowingly abuses, sexually abuses, or neglects an older person or a person with a developmental disability is guilty of a misdemeanor and upon a first conviction may be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. Upon a second or subsequent conviction, the individual may be imprisoned for a term not

to exceed 10 years and may be fined an amount not to exceed \$10,000, or both. A person convicted of purposely or knowingly exploiting an older person or a person with a developmental disability in a case involving money, assets, or property in an amount of \$1,000 or less in value shall be fined not more than \$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. A person convicted of purposely or knowingly exploiting an older person or a person with a developmental disability in a case involving money, assets, or property in an amount of not more than \$1,000 in value shall be fined not more than \$50,000 or be imprisoned in a state prison for a term not to exceed 10 years or both.

Federal requirements for participation in the Medicare and Medicaid programs

Nursing Facilities in Montana are subject to nursing home standards and the federal objective of the Nursing Home Reform Act, part of the Omnibus Budget Reconciliation Act of 1987, to ensure that residents of nursing homes receive quality care. Sections 1819(a), (b), (c), and (d) and Sections 1919(a), (b), (c), and (d) of the Social Security Act provide respectively that skilled nursing facilities participating in Medicare and nursing facilities participating in Medicaid must meet requirements that support the service of quality of care. Those requirements, for long-term care facilities giving the care and states monitoring the care, provide the scope and basis for the provisions of parts 483 and 488 of Title 42 of the Code of Federal Regulations (CFR).

Section 1864(a) of the Act directs the Secretary of the U.S. Department of Health and Human Services to make agreements with state health agencies for their services to act as the State Survey Agency and conduct surveys to determine if long-term care facilities meet federal standards. The state survey agency in Montana is the DPHHS Quality Assurance Division, Certification Bureau. Certification is a recommendation made by the Survey Agency to the Centers for Medicare and Medicaid Services (CMS), based upon the Survey Agency's ascertations of the facility's compliance or noncompliance with the minimum requirements for coverage.

The federal requirement related to abuse and staff treatment of residents can be found at 42 CFR 483.13 "Resident behavior and facility practices" subsection (c) "Staff treatment of residents". Under this federal requirement nursing facilities must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and the misappropriation of resident property.

This regulation is addressed by the Certification Bureau in a facility survey under federal regulation tags F225 and F226, pertaining to employee screening (i.e. background check and/or criminal history), and verification of license and/or certification.

As provided per tag F225, 42 CFR 483.13 (c) (1) (ii) the facility must not employ individuals who have been found guilty of abusing, neglecting, or mistreating residents by a court of law or have a finding entered into the state nurse aid registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property. The nursing facility must also report any knowledge it has of actions by a court of law against

an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the State nurse aide registry or licensing authorities (42 CFR 483.13 (c) (1) (iii)). In addition, under 42 CFR 483.13.(c)(2) the facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency). The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress (42 CFR 483.13 (c)(3)) and the results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with State law (including the State survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken (42 CFR 483.13(c)(4)).

Facility documentation is reviewed by the survey team to ensure compliance with this federal regulation and includes the following procedures:

1. Verification of current license and/or certification for personnel file.
2. Verification by the nursing facility to the state agency regarding the employees Certified Nurse Aide (CNA) status. If the employee is a CNA, the nursing facility is required to verify that the employee has not lost their CNA status due to elder abuse occurring in a nursing home. The facility must contact state agencies in those states for which the person reports living to verify the certification and/or license is clear in that state(s).
3. The facility must receive or complete a skills checklist on an employee wanting to become certified as a CNA prior to them providing direct care to residents and retain a copy of that completed and signed skills check list in the personnel file.
4. Nursing Facilities are required to develop and implement policies and procedures which include the seven protocols of abuse prevention outlined by CMS. These 7 protocols are: prevent, screen, identify, train, protect, investigate, and report/respond. Details and survey guidance are provided in Attachment A.

Temporary agencies are not regulated by these regulations. If a facility hires a licensed or certified person from a temporary agency, it is the nursing facility's responsibility to complete these requirements and have evidence of those checks in the personnel files.

Nursing facilities are subject to significant oversight by regulatory authorities and visitors. The Certification Bureau is required to conduct on site visits to each nursing home at a minimum of once every 15 months. Additional visits are made upon receipt of complaints based upon mandatory reporting requirements as outlined in the federal regulations mentioned above. These reports generally come from visitors and staff of the nursing facilities that witness and report events to the Certification Bureau. The result of this oversight is that Nursing facilities are required to provide staff training related to elder abuse and neglect.

In addition to Certification Bureau visits, the Regional Office in Denver is required by federal regulation to conduct several surveys per year in Montana. The purpose of these on site visits by Regional Office staff is to assure that the state agency is conducting the surveys per the State Operations Manual. In addition, the State Licensure Bureau has the ability to conduct on site visits for licensure and/or complaint investigations similar to the Certification Bureau.

State licensure rules and regulations

Assisted Living Facility Administrative Rules of Montana (ARM) establish administrator hiring requirements and employee records. Under ARM 37.106.2816 "ASSISTED LIVING FACILITY STAFFING", the administrator shall develop minimum qualifications for the hiring of direct care staff and support staff. The administrator shall develop policies and procedures for screening, hiring and assessing staff which include practices that assist the employer in identifying employees that may pose risk or threat to the health, safety or welfare of any resident and provide written documentation of findings and the outcome in the employee's file. New employees shall receive orientation and training in areas relevant to the employee's duties and responsibilities, including: The Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act found at 52-3-801, MCA; and the Montana Long-Term Care Resident Bill of Rights Act found at 50-5-1101, MCA.

In addition under ARM 37.106.2817 "EMPLOYEE FILES" the employer must have evidence of contact to verify that each certified nursing assistant has no adverse findings entered on the nurse aid registry maintained by the DPHHS Certification Bureau. A facility may not employ or continue employment of any person who has adverse findings on the department nurse aide registry maintained by the department's Certification Bureau.

Guidance is also provided to assisted living facilities via the department's website regarding the prevention of abuse and neglect such as:

- Use of the Board of Nursing background check by Licensure Bureau staff during complaint investigations or adverse licensure findings.
- Cooperation with state and local Ombudsman, Adult Protection Services, Medicaid Fraud Unit, SLTC case managers and workers, Board of Nursing, Board of Pharmacy and local law enforcement officers.
- Available on-line complaint form which goes to all Licensure Staff.
- Family and other visitors, including public health nurses and home health nurses, clergy and other organizations.

Other measurers and procedures to prevent elder abuse

Department of Labor - Board of Nursing: The board has access to a secured national data base that can track RN/LPN licensure history from all U.S. states. The Board of Nursing requires the individual's date of birth, name and/or social security number. This tool is

extremely useful with individuals who travel from one state to another to avoid detection. The Board of Nursing conducts on site investigations at nursing homes when appropriate.

Ombudsman Program: The Ombudsman program has local and regional ombudsman strategically located throughout the state of Montana and play an active daily role as advocates for the nursing facility residents. Local Ombudsman are funded through the Older Americans Act & employed by the Area Agencies on Aging. They are required to visit each nursing home at least once per month and some visit as often as weekly. Visits can be more frequent if a complaint has been received. Ombudsmen provide training on Resident Rights and other related topics to facility staff on a regular basis. The local Ombudsman makes a concerted effort to attend Resident Council meetings and Family Council meetings.

On a regular basis, the local Ombudsman program files formal complaints related to care issues or assists residents and/or families in filing complaints. While the Ombudsman program can address resident rights issues, coordination of care, discharge issues, etc., there are medical situations for which they are not trained, nor do they have the expertise to address. The Ombudsman program works well with Certification Bureau and the Licensure Bureau and they have regular meetings once a month to coordinate the exchange of information. More importantly for the resident and their family, they are able to protect the confidentiality of the complainant.

CRIMINAL BACKGROUND CHECKS – CMS PILOT and OTHER STATES

On April 8, 2004 CMS issued a letter to all State Survey Agency Directors regarding an upcoming criminal background checks pilot program. Montana chose not to participate in the pilot, because upon review of Montana law the Department had no authority to implement a pilot program for background checks. However, other states did apply to participate in the pilot program. The states included in the pilot were selected by CMS as they represented a mix of rural and urban areas and included ethnically and culturally diverse populations. The pilot states include: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin. The pilot project is expected to end on September 20, 2007.

With the assistance of the Montana Health Care Association, and MHA... an association of Montana Health Care Providers, we obtained information from other States on their rules and regulations as they pertain to criminal background checks. The table below identifies the States and information regarding their provisions for criminal background checks. We were unable to obtain information from all the states but for those that we were able to obtain information indicates that most do have a requirement for criminal background checks on all long-term care employees. Several States also require the criminal background checks on all health care facility workers. However, those States that do have this requirement do not always require an FBI criminal background check that includes fingerprint verification. The costs and who pays, the provider or the State, varies from the facility or provider, to the employee, and in some cases it was not

identified so we noted that with "unknown". The cost for criminal history checks ranges from \$2.00 to \$100.00, with most in the \$20-\$50 range.

OTHER STATES – CRIMINAL BACKGROUND CHECK REQUIREMENTS

<i>STATE</i>	<i>CRIMINAL HISTORY STATE MANDATED ALL LTC EMPLOYEES</i>	<i>CRIMINAL HISTORY STATE MANDATED ALL HEALTH CARE FACILITIES</i>	<i>FBI CRIMINAL HISTORY CHECK INCLUDES FINGER PRINT CHECK</i>	<i>COST</i>	<i>WHO PAYS FOR CRIMINAL HISTORY CHECKS</i>
Arkansas	Yes	No	Optional	\$20-24	Individual or facility
California	Yes	Yes	Required	\$100	facility
Florida	Yes	Yes	Optional	\$23-47	unknown
Idaho	Yes, LTC, HHA, Swing beds, Assisted living & Hospice	No	Yes	\$28-45	facility
Iowa	Yes	No	No	\$3.00	unknown
Massachusetts	Yes & home based settings	No	No	\$30	Facility or provider
Nevada	Yes	No	Yes	\$45	Providers and applicant share cost
New Mexico	Yes	Yes	Yes	\$65	employee
New York	No	No	No	N/A	N/A
Oklahoma	Yes	Yes	No	\$15	employer
Pennsylvania	Yes	unknown	Yes	\$10	facility
South Carolina	Yes	Yes	Yes	unknown	unknown
Wisconsin	Yes	No	Yes	\$2-18	unknown
Montana	No	No	No	N/A	N/A

NOTEWORTHY PROVISIONS OTHER STATES

The State of New Mexico allows a person requesting a criminal history check to receive a hard copy document of their criminal history check findings. This document is valid for

one year thus the employee can take the document from employer to employer without incurring additional cost.

The State of Arkansas charges only \$20.00 for an online criminal record check offered through the Arkansas State Police. Under Arkansas Code Annotated 20-33-210, individuals and qualified entities are immune from suit or liability for damages for acts or omissions other than malicious acts or omissions, occurring in the performance of duties imposed by the law governing criminal background checks.

The State of Wisconsin charges only \$2.00 for non-profit organization requests through the internet.

The State of Florida has a provision that if the employee refuses to cooperate they will be disqualified for the position. Florida also puts the burden of responsibility on the employer who must either terminate the employment of any of its personnel found to be in noncompliance with the minimum standards for good moral character contained in this section or place the employee in a position for which background screening is not required unless the employee is granted an exemption.

The State's of Idaho, New Mexico, Oklahoma, and Pennsylvania provide a list of disqualifying crimes that will prevent a person from being hired in a nursing facility.

Missouri limits the national background check to Missouri unless the applicant has lived in the state for less than 5 years.

HOW TO CONDUCT A CRIMINAL BACKGROUND CHECK IN MONTANA

Background checks, sometimes known as records checks or criminal history checks, are available to local, state and federal law enforcement agencies and the general public through the Montana Department of Justice. Law enforcement organizations may receive all criminal history information that is available in Montana and across the nation, as long as the information is requested for criminal justice purposes. The general public may receive arrest and prosecutor/court information on felony charges and misdemeanor charges, but information is limited by Montana's privacy laws. Criminal records that have been convictions with deferred sentences cannot be released to the public.

There are two types of checks:

- Name based check—a search of Montana public criminal history record information only, using an individual's name, date of birth and social security number.
- Fingerprint checks—accurate, comprehensive information, including access to criminal history information in Alaska, Idaho, Nevada, Oregon, Utah and Wyoming. The States listed are often referred to as "WIN" states and Montana is included in this cooperative agreement with these states to reduce costs associated with the fingerprint checks. A full fingerprint based check is available through the FBI at an additional cost.

How to request a background check:

1. Requests for background checks must be made in writing.
2. Specify whether the request is for a name check or a fingerprint check.
3. Enclose a self-addressed stamped envelope and payment with a written request. Payment amount varies from \$10.00 to \$34.00 depending on the type of check requested.
4. Mail the complete request to Criminal Records and Identification Services, Department of Justice, 303 N Roberts 4th Floor, Helena, MT 59620-1403.

Response time is estimated at 7-10 days. However, discussion with employees from DOJ who conduct the background checks in Montana, August is very busy month due to the screening process of teachers. DOJ is currently developing a screening tool that will be specific to individual employers and would be capable of screening for specific criminal convictions.

DEPARTMENT EXPERIENCE WITH CRIMINAL BACKGROUND CHECKS

Montana has had the opportunity, through the DPHHS Child Care Licensing Program (CCLP) to establish some history with regard to the process of acquiring criminal background checks.

Under the National Child Protection Act/Volunteers for Children (NCPA/VCA) individuals working with children, elderly or the disabled qualify to have a national fingerprint-based background check conducted. A finger print check can access both the state DOJ criminal history data base and the FBI data base. The results of the background check can only be disseminated to an approved entity of which Montana DPHHS is considered. The cost of the background check varies depending upon the particular data base that is accessed.

This process utilized by CCLP includes varying processes and costs for the criminal background checks:

Process

There are two types of checks:

- Name-based check—a search of Montana public criminal history record information only, using an individual's name, date of birth and social security number.
- Fingerprint checks—accurate, comprehensive information, including access to criminal history information. Fingerprints can access both the State DOJ data base and the FBI database.

Upon initial application, or renewal, the CCLP receives Release of Information (ROI) documents from all caregivers and as applicable, adult household members. The ROI asks basic demographic information including name (all names used, including 'aka'), date of birth, social security number, and physical address.

From the data on this ROI, staff of the CCLP access Criminal Justice Information Network (CJIN) and request a name based history check on the identified person. The result is usually instantaneous, unless there is missing dispositional information or that dispositional information is questionable. In those events, there is a "72 hour" warning that is displayed.

If an applicant, licensee, caregiver, non-provider staff person or adult members of the household have lived in any state other than Montana in the previous 5 years, the CCLP automatically requests that the person be fingerprinted for purposes of conducting an FBI database check. This database includes criminal history information from all 50 states.

Cost

Because the CCLP has an agreement with State DOJ, there currently are no costs to the provider for the State criminal records check, as long as the request for that information comes through DPHHS. However, if the provider requests the record check on their own, there is a basic \$10.00 fee for the criminal record and \$4.00 for a driver services history check.

The cost issue for the CCLP and the provider is more associated with the FBI check. The cost for an FBI check is now \$34.00, of which \$10.00 is a State DOJ fee. The cost for the FBI check is the responsibility of the provider; in some cases the provider actually ends up paying an additional \$10.00 to the law enforcement agency for the act of 'fingerprinting' the individual. Therefore, in some cases, the cost of obtaining an FBI fingerprint check can be as much as \$44.00 total.

Another option available is to conduct a statewide fingerprint-based check. Since Montana shares their fingerprint database with Alaska, Oregon, Utah, Wyoming, Nevada and Idaho these states are automatically searched at no additional cost. The fee for this is \$10.00.

STAFF TURNOVER AND THE COST IMPACT OF BACKGROUND CHECKS

Nursing facilities historically have a very high turnover rates for direct care workers. The Mountain Pacific Quality Health Foundation a Quality Improvement Organization (QIO) reported that 62% of nursing facilities they worked with (32 nursing homes in Montana) reported a 50% turnover rate and 4% of the nursing facilities reported a turnover greater than 100%.¹ The QIO is under contract with CMS to complete a "scope of work" which includes collection of CNA turnover rate statistics. This data is baseline data and more data will be collected in February 2007 and again in November 2007. In addition, in another study published by the American Health Care Association², nursing homes had numerous nursing staff related vacancies in 2002. That study indicated that nationally the CNA turnover rate was estimated at over 71 percent. In Montana, the annualized

¹ Department notes from a QIO presentation on June 28, 2006.

² American Health Care Association "Results of the 2002 AHCA Survey of Nursing Staff Vacancy and Turnover in Nursing Homes" February 12, 2003.

turnover rate for the six months ended June 30, 2002 was estimated to be 80.5% for CNA's. Montana is included with 37% of the States that have a rate that exceeded 80%. Therefore, CNA turnover rates are a particular concern to nursing facilities as CNAs are responsible for the majority of the direct, hands-on care. This high turnover rate in Montana could result in significant costs for the providers and or the State to conduct criminal background checks.

For example, Montana has approximately 9,400 CNAs on the Nurse Aide Registry. If Nursing Facilities were required to conduct background checks on all CNA's, the turnover rates indicated in the AHCA study, would result in a cost of over \$263,000.³ This cost would be assumed by either the health care provider or the State and typically would require additional costs associated with mailing documents, staffing to process paperwork and related administrative expenses. For example, New Mexico charges \$65.00 for the criminal background checks. This fee appears to be inclusive of the related administrative charges to conduct these services under State Law. New Mexico processed 20,764 applications in FY 2003, which amounted to a cost for health care providers of over \$1.3 million dollars. This cost would be in addition to the employment and recruitment costs related to staff turnover that are estimated to be approximately \$3,500.00 according to an article published in the April 2006 Center for Medicare Advocacy Inc..

ISSUES REGARDING BACKGROUND CHECKS AND INQUIRIES TO THE NURSE AIDE REGISTRY

- The prospective employee or already hired employee uses an alias or changes name due to marriage, divorce or choice. The nurse aide registry check may fail to identify the person correctly by name given on the application form.
- The prospective employee or already hired employee may alter or provide a false social security number thus the nurse aide registry check and any background check or criminal history check may fail to correctly identify the person.
- Deferred sentences are dropped from the criminal history after an individually specified time period. The criminal history check may fail to provide important information to the employer.
- The facility may fail to verify required information and takes the word of the employee or temporary agency.
- Pending criminal action does not prevent the person from employment eligibility. The person who has been charged with a crime may continue to work in the nursing facility until sentencing occurs and the nurse aide registry is notified.
- Hospitals, Assisted Living facilities, Critical Access facilities, private duty agencies, group homes are not required by federal or state regulations to verify CNA status with the State Nurse Aide Registry.
- A person convicted of crimes against another person can continue to be a CNA in the State of Montana. The only crimes that prevent a person from being a CNA in

³ Based upon the assumption of an estimated cost of \$35.00 to conduct a fingerprint based criminal background check.

Montana are crimes against an elder in a nursing home. For example: A person who was convicted of theft of an assisted living resident's money cannot be prevented from working in the nursing home by the state agency/nurse aide registry.

- The statute of limitations on elder abuse is one year. Attorneys rarely charge a person quickly thus the employee continues to work for up to a year or longer after the incident of elder abuse has occurred.
- Attorneys, including county attorneys, often will not pursue cases of abuse unless the victim has lost money, and/or has visible injuries. Verbal and/or emotional abuse is never pursued. Thus a record of abuse will not be contained in the Department of Justice records.
- In court cases, the victim's cognitive status is questioned. Most residents in nursing homes require supervision because they lack capacity for remembering short term events. A great number of residents in nursing facilities have diagnosed mental health problems. These victims are not able to be witnesses in many situations.
- Family members and residents frequently choose not to report or refuse to report theft of money and/or credit cards to law enforcement believing that at least one of several things will happen: The employee will continue to work at the facility and will retaliate against the resident for reporting. The employee will pay back the money so there is no need to get the law involved. No one will believe them if they report the missing funds. Feelings of embarrassment "I shouldn't have left it there!" or "I shouldn't have offered to help him/her!" or "It's my own fault!"
- Some local law enforcement offices will not respond to nursing home complaints unless a certain value threshold is met. In other words they won't investigate unless a felony is involved.
- A conviction of elder abuse only carries a maximum of a \$1,000.00 fine.
- Frequently, plea bargains occur where the conviction of elder abuse is plead away due to other convictions being easier to obtain or more agreeable to the attorney's and other parties involved. In Montana, without the conviction of elder abuse, the CNA status cannot be removed.

CRIMINAL BACKGROUND CHECKS FOR MONTANA

The issue regarding criminal background checks in Montana is not new. In fact Montana employs this requirement for many professions, such as child care providers and child care workers as was mentioned earlier in this document.

The Montana legislature has considered several bills over the last decade regarding this issue for a variety of professions and services. Based upon the information we were able to obtain from the legislative services website, legislation was introduced and debated in the 1999, 2003, and 2005 legislative sessions. In 1999 HB 590 would have required background checks for certain school employees. This bill died in process on 4/22/1999. In 2003, two bills were introduced SB 32 and SB 328. SB 32 passed and became law to revise lottery background checks to meet FBI required criteria and SB 328 which died in

Standing Committee on 4/22/2003. This bill would have required background checks for employees of drop-in child care. The 2005 legislature addressed SB 357 to require criminal background checks before licensing social workers. This bill died in Standing Committee on 4/21/2005.

In addition, we also found legislation that was drafted by the Legislative Services Division for the 57th legislature that was never introduced. One bill intended to designate the Department of Commerce as a criminal justice agency for the purpose of obtaining confidential criminal justice information in the administration of Title 30, chapter 14.⁴ Another proposed bill would have authorized the Superintendent of Public Instruction to require fingerprinting and background checks of applicants for teachers, administrators, or specialist certification⁵. Background checks are often an issue for the Montana legislature to debate and consider for Montana. Some are successful and some do not pass the scrutiny of the legislature.

An increasing numbers of states are making criminal background checks a requirement under state law for direct care workers in healthcare facilities. Some states require a state criminal background check for certified nursing assistants, and some also require a national check. The requirements vary from a state only check, national checks and requirement to conduct the background check under certain circumstances such as when employees have recently relocated from another state. Many state laws prohibit employment if certain felony convictions are found. Such as: homicide; trafficking in controlled substances; kidnapping; false imprisonment; aggravated assault; rape or other related criminal sexual offenses; crimes involving robbery, larceny extortion, forgery, embezzlement; or crimes involving adult abuse, neglect or financial exploitation.

Due to the high turnover in nursing facilities and the limitations of nurse aide registries managed by state survey agencies there is a perception that individuals with serious criminal records in one state can simply travel to another state to find work. In addition, individuals with a criminal background can also move from working in nursing facilities to assisted living facilities, home health agencies or community care services thus endangering the health and safety of seniors in Montana. This is especially the concern given the fact that other states in the country are implementing criminal background checks. The perception and fear is those individuals may be going to states where criminal background checks are not required, such as Montana.

If Montana were to implement a requirement for criminal background checks it will touch off an interesting debate of the need for this requirement and who is going to incur the cost of this service. Will the cost be born entirely by the healthcare providers to pay for this requirement or will the cost be absorbed by the State and funded by the legislature. The results of the background check must be reported to a governmental agency, of which DPHHS has that designation with the DOJ. Therefore the administration of this requirement will be born by either the Department of Justice or another governmental agency such as DPHHS utilizing the systems and services of the

⁴ LC0312

⁵ LC1298

DOJ and the FBI. This increase administrative burden will also be felt by the healthcare industry as well in an environment that already has numerous federal and state regulations for the delivery of health care services for the elderly and disabled.

In addition, do we have a real problem in this State where there is documentation of hiring of criminals and abusers? Some would argue that a problem does exist and may be able to cite specific examples of problems. But how widespread is the problem and will a criminal background check be 100% accurate in preventing abuse of the elderly in Montana? We do not have the answers to these questions, but that in itself does not minimize this issue and the public policy debate to protect the health and safety of Montanans.

State Operations Manual

Appendix Q - Guidelines for Determining Immediate Jeopardy - (Rev. 1, 05-21-04)

Attachment C - Overview - Recommended Key Components of Systemic Approach to Prevent Abuse and Neglect

**Examples--Key Components applied to the following provider types:
Key Components Applicable To All Providers**

1. Prevent

The facility or system has the capacity to prevent the occurrence of abuse and neglect and reviews specific incidents for “lessons learned” which form a feedback loop for necessary policy changes.

Nursing Homes

Regulation Authority: 483.13(b), 483.13(c), 483.13(c)(3)

Survey Guidance - Surveyors determine if:

The facility must develop and implement written policies and procedures that include the seven key components: screening, training, prevention, identification, investigation, protection and reporting/response; the facility identifies, corrects and intervenes in situations in which abuse or neglect is more likely to occur, and the facility identifies characteristics of physical environment and deployment of staff and residents (e.g., those with aggressive behaviors) likely to precipitate abuse or neglect.

ICFs/MR

Regulation Authority: 483.420(a)(5), 483.420(d)(1), 483.420(d)(1)(I)

Survey Guidance - Surveyors determine if:

The facility has and implements abuse prevention policies and procedures; and the facility organizes itself in such a manner that individuals are free from threat to their health and safety.

2. Screen

The facility or system provides evidence and maintains efforts to determine if persons hired have records of abuse or neglect.

Nursing Homes

Regulation Authority - 483.13(c)(1)(ii) (A)&(B)

Survey Guidance - Surveyors determine if: The facility screens potential employees for a history of abuse, neglect, or mistreating residents as defined by the applicable requirements.

ICFs/MR

Regulation Authority - 483.420(c)(1)(iii)

Survey Guidance - Surveyors determine if: The facility screens potential employees to prohibit the employment of individuals with a conviction or prior employment history of child or client abuse, neglect, or mistreatment.

3. Identify

The facility or system creates and maintains a proactive approach to identify events and occurrences that may constitute or contribute to abuse and neglect.

Nursing Homes

Regulation Authority - 483.13(c)(2)

Survey Guidance - Surveyors determine if: The facility identifies events such as suspicious bruising of residents, occurrences, patterns and trends that may constitute abuse; and determine the direction of the investigation.

ICFs/MR

Regulation Authority - 483.420(a)(5)

Survey Guidance - Surveyors determine if: The facility identifies patterns or isolated incidents of unexplained functional regression, or other evidence of physical, verbal, sexual or psychological abuse or punishment posing a serious and immediate threat to individuals.

4. Train

The facility or system, during its orientation program, and through an ongoing training program, provides all employees with information regarding abuse and neglect and related reporting requirements, including prevention, intervention and detection.

Nursing Homes

Regulation Authority - 483.74(e)

Survey Guidance - Surveyors determine if: The facility has procedures to train employees, through orientation and on-going sessions, on issues related to abuse prohibition practices.

ICFs/MR

Regulation Authority - 483.420(d)(1), 483.430(e)(1)

Survey Guidance - Surveyors determine if: Facility ensures that staff can define what constitutes abuse and punishment and actively promotes respect for individuals; and facility assures that staff have received training, both upon hiring and on an ongoing basis, which results in the competencies needed to do their job.

5. Protect

The facility or system must protect individuals from abuse and neglect during investigation of any allegations of abuse or neglect.

Nursing Homes

Regulation Authority - 483.13(c)(3)

Survey Guidance - Surveyors determine if: The facility has procedures to protect residents from harm during an investigation.

ICFs/MR

Regulation Authority - 483.430(d)(3)

Survey Guidance - Surveyors determine if: The facility prevents further potential abuse while the investigation is in progress.

6. Investigate

The facility or system ensures, in a timely and thorough manner, objective investigation of all allegations of abuse, neglect, or mistreatment.

Nursing Homes

Regulation Authority - 483.13(c)(2)(3)&(4)

Survey Guidance - Surveyors determine if: The facility has procedures to investigate different types of abuse; and identify staff member responsible for the initial reporting of results to the proper authorities.

ICFs/MR

Regulation Authority - 483.420(d)(3)

Survey Guidance - Surveyors determine if: The facility investigates all injuries of unknown origin and allegations of mistreatment, neglect, or abuse.

7. Report/ Respond

The facility or system must assure that any incidents of substantiated abuse and neglect are reported and analyzed, and the appropriate corrective, remedial or disciplinary action occurs, in accordance with applicable local, State or Federal law.

Nursing Homes

Regulation Authority - 483.13(c)(1)(iii), 483.13(c)(2), 483.13(c)(4)

Survey Guidance - Surveyors determine if: The facility has procedures to report all alleged violations and substantiated incidents to the State agency and to all other agencies, as required, and to take all necessary corrective actions, depending on the results of the investigation; report to State nurse aide registry or licensing authorities any knowledge it has of any action by a court of law which would indicate an employee is unfit for service, and analyze the occurrences to determine what changes are needed, if any, to policies and procedures to prevent further occurrences.

ICFs/MR

Regulation Authority - 483.420(1)(6), 483.420(d)(2), 483.420(d)(4)

Survey Guidance - Surveyors determine if: The results of all investigations are reported to the administrator or designated representative or to other officials in accordance with State law within 5 working days of the incident and, if the alleged violation is verified, appropriate corrective action is taken.